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ABSTRACT

The major objectives of this paper are to explore those rhetorical strategies and tactics used by both loyalists and radicals in expressing their respective grievances following the Boston Massacre, and to assess their efficacy in so doing. The unique aspects of the colonial situation are explored, the reaction and behavior of the Bostonians are reviewed, and the legal proceedings in the matter considered, particularly as concerns John Adams' position as defense attorney and Josiah Quincy's position as prosecutor. (LL)

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"The Rhetorical Shot Heard 'Round the World: Legal and Extra-legal Strategies in the Boston Massacre Trials"

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In this our 200th anniversary of independence it seems appropriate to reflect upon those historic events which precipitated our severance from Britain. The subject of this paper is just such an event, an event dignified in history as the "Boston Massacre," and proclaimed in the folklore of legal history a "monument to the American sense of justice."[1]

The details of the incident have often been told. On the evening of March 5, 1770, a lone British sentry was accosted by a group of townspeople while standing guard before the customs house in King Street. The ruckus attracted considerable attention and when the church bells sounded the alarm for fire, the surrounding populace hurried en masse to the square. The sentry called to the main guard for assistance, whereupon Captain Thomas Preston, accompanied by an armed detail, went to his rescue. The soldiers were taunted with epithets and assaulted with snowballs, oyster shells, sticks and clubs. During the ensuing scuffle the soldiers fired and as a result five civilians died and six were wounded. Arrest warrants were drawn up. Preston voluntarily surrendered to the sheriff and he and his men were subsequently remanded to the Gaol.[2]

The incident provided a rhetorical exigence perceived by both loyalists and radicals to require immediate response. Both proceeded to launch a propaganda battle rarely equalled in the annals of American history. Both seized this opportunity to create a rhetorical climate in which their respective grievances could be aired and their actions interpreted and rationalized.

And both employed strategies and tactics requiring maneuvers on two fronts--legal and extra-legal.

> The available documents suggest strongly that the loyalists, and particularly the military, hoped to use the trials as showcases demonstrating the hostility the troops had encountered at the hands of the townspeople since their arrival in 1768. The radicals, of course, were eager to show that the soldiery had been persistently and deliberately provocative. Thus each side hoped to use the trials for propaganda purposes.[3]

The major objective of this paper is to explore those strategies and tactics and to assess their efficacy. Assessment of rhetorical merit can only follow once the unique aspects of the colonial situation have been explored. If the choices of the participants are to be evaluated on the basis of their suasory potentiality it becomes necessary to determine which rhetorical strategies and tactics were feasible and which were not.

Immediately after the incident both sides stocked their rhetorical arsenals with appropriate weapons. The first logistical task was to collect prospective evidence. Accordingly, both sides procured depositions from available eye witnesses. The town's side of the story was quickly assembled and published as A Short Narrative of the Horrid Massacre in Boston.

> The professed design of taking the depositions, was to prevent ill impressions against the town. The depositions were not generally in a form of words prepared by the deponents, but, when they had declared their knowledge of facts, the form and words of the depositions were settled by the Committee or Justices--There was no cross examination & no body present to ask any questions to elucidate any parts of the depositions--no scrutiny was made into the credit, and characters of the deponents.[4]

Acting Governor Hutchinson was clearly cognizant of the propaganda value of the depositions collected by the town. General Thomas Gage was equally distraught by the Narratives and placed his faith in the account being prepared by Lieutenant Colonel William Dalrymple.

> The Diabolical Account given of the late unhappy Affair in the Boston Papers, particularly that of Edes and Gill, is too preposterous and absurd to gain credit with any that are not prejudiced, and I am glad you are preparing a true and impartial Narrative of the Affair.[5]

Although twenty-six affidavits had been procured exonerating the soldiers and establishing the "Premeditated design in the People to attack the Soldiers";[6] these did not appear in any American edition of the Narratives. They were however added as an appendix to the pamphlet published in London under the title of A Fair Account of the Late Unhappy Disturbance at Boston in New England. From "horrid massacre" to "late unhappy disturbance"--

the titles alone reflect the images which each side tried to project to the public. And Gage was probably correct when he wrote to Dalrymple "that the Malevolent & Malicious Spirit which prevails, will procure Witnesses enough to Swear to every thing that will Answer their Purposes."[7]

The colonial publications, accompanied by the inaccurate Pelham/Revere engraving[8] tended to support the inhabitants view, depicting the soldiers as the villans. The crown depositions supported the notion that the inhabitants had conspired to incite a riot and to expell the King's troops from the town.

Dalrymple seemed convinced that the mischief originated with the inhabitants. He wrote to Gage on March 7th "The endeavours of the people ever since our arrival have been used, to produce some considerable disturbance with the troops lately more than ever, and it has been commonly said that they were determined to get them removed."[9] On March 12, this time with even more conviction that the colony was bent on armed resistance to the King's troops, he wrote to Gage: "I doubt not but it will fully appear that the attack of the kings troops was a concerted measure, that it only failed by being too early carried into execution."[10]

As its second maneuver the town sought to have the troops removed from Boston, ostensibly to preclude further violence and bloodshed. A town meeting was convened and the immediate expulsion of the two regiments demanded: "nothing will satisfy the Town, less than a total and immediate removal of the Troops."[11] The military complied and the two regiments were removed to Castle William, far out in the Boston Harbor.

In contrast, the military were severely limited in their legal/rhetorical options. Criminal defendants in colonial Massacheusetts were particularly limited. Presumed to perjure themselves, they were precluded from testifying in their own behalf. Denied any direct control over the criminal proceedings against them, defendants had to rely exclusively upon the efforts of counsel representing them, unless they were willing and able to take their cause directly to the public. Furthermore, the military were not as successful as the town in their first extra-legal efforts. On March 12, 1770, Captain Thomas Preston, in hopes no doubt of ingratiating himself with the townspeople, took his fate into his own hands and as an extra-legal maneuver had the following note published in the Boston Gazette:

> Permit me thro' the Channel of your paper, to return my Thanks in the most publick Manner to the Inhabitants in general of this Town--who throwing aside all Party and Prejudice, have with the utmost Humanity and Freedom stept forth Advocates of Truth, in Defense of my injured Innocence, in the late unhappy Affair that happened on Monday Night last: And to assure them, that I shall ever have the highest Sense of the Justice they have done me, which will be ever greatfully remembered, by
>
> Their most obliged and most obedient humble Servant,
>
> THOMAS PRESTON[12]

Although the immediate effect of Preston's message may have been favorable in abating the tempers of the town, the gesture was premature and would later prove embarrassing.

The wisdom of his maneuver was promptly questioned by Gage and served as a premonition of impending actions.

> We see a Publication of Captain Preston's in the Papers, thanking the People for laying aside all Prejudice &ca, I can't be a proper Judge at this Distance, but I wish he may not have been too premature in that Measure; And if Illegal Proceedings are hereafter made use of against him, they will justify themselves by his own Words.[13]

Two weeks after the incident in King Street, March 19, 1770, Captain Preston dispatched his first letter to General Gage, in which he offered his account of what had transpired that fatal evening before the customs house. His narrative is quite explicit in its criticism of the townspeople and recounts numerous incidents of conflict dating from the arrival of the troops in 1768. The account does give us some insight into Preston's motivations and actions. Apparently he felt that the sentry posted at the customs house was in danger of being carried off and murdered by the crowd and therefore he dispatched his men to extricate the soldier from the situation.[14]

Had Preston's sole purpose been to rescue the sentry he would have had sound law on his side. Unfortunately, Preston chose to justify his actions further. He feared that the mob action "might be a Prelude to their plundering the King's Chest."[15] This noble and patriotic gesture did not have its intended consequences. Upon receiving Preston's letter, Gage shared his views with Dalrymple:

> Captain Preston's own Account I rather wish kept here than sent home. He had no Business to defend the Custom House, unless legaly called upon. I suppose his Motive for sending the Party was, to relieve the Centry who was attacked, and bring him back to the Guard to preven. Mischief. Other Motives were no doubt good, honest and Military, but they may not be good in Law, where a Military Man Acts by his own Authority Solely.[16]

Dalrymple concurred with Gage: "I agree perfectly with you on the propriety of keeping Captain Preston's state of his case to ourselves, the doing ones duty well here is dangerous, and will be thought illegal."[17]

Preston's rhetorical efforts, while seemingly sound, are not so when evaluated in light of prevailing legal doctrine. The soldiers were entrusted with keeping the peace without the authority to employ force against the inhabitants. When confronted by civilian rioters the military were not authorized to use their weapons unless so ordered by a civil magistrate. The situation was a precarious one.[18]

Since Preston had not acted pursuant to civilian orders he could justify his actions only if he went to the scene on military business: in order to prevent the people from plundering the King's money he needed civilian authorization; otherwise, his presence would be illegal.

As the correspondence between Dalrymple and Gage indicates, they hoped to suppress Preston's account of what happened. Their efforts, however, were unsuccessful. Inadvertantly a copy of

Preston's letter reached England and was subsequently published in several London newspapers, including the Public Advertiser of April 28th.

By mid-summer the publication reached Boston, its unintended destination, and provided the town council with an interim rhetorical exigence. In response, an advertisement in the Boston Evening Post of Monday, July 9th urged the townspeople to attend a meeting scheduled for the following morning at Faneuil Hall "to counteract the Designs of those inveterate Enemies among us, who, there is reason to think, are still continuing their Misrepresentations, and using their Endeavours to increase the present Unhappy Misunderstanding."[19]

Gage and Hutchinson were quite distraught by the publication. Gage wrote to Dalrymple confirming his premonitions regarding Preston's original gesture. His "foolish Advertisement is printed with the rest, so you see they have already made their use of that unadvised Step."[20] Hutchinson relayed his fears to Gage and lamented the publications: "...the people were enraged upon reading Capt. Preston's Narrative which I wish had not been published in England."[21]

The problem as perceived at the town meetings which followed required a two-fold response. First, Captain Preston's accusations against the inhabitants of Boston had to be answered. And second, any "ill Impressions" created in England had to be corrected.

The council seized the opportunity to cast Preston in an unfavorable light. They challenged him to reconcile his letter of March 12th and the publication appearing in London April 28th.

Preston was snagged in a rhetorical web of his own making. At first he attempted to repudiate his accusations by claiming that that which was published in Boston differed materially from the original which had been sent to England.[22] When pressured to disclose the alleged differences or support his accusations, Preston declined further comment,[23] heeding Gage's advice to continue to maintain silence.

> You did very right to give no Answer to the Letter from the Committee, as you may be certain both their visit to you first, and their Letter afterwards had no other Meaning than to entrap you. At the Beginning of this unhappy Affair you was unwarily drawn in to publish an Advertisement, advised to it no doubt as a measure proper to ingratiate yourself with the People. The Intent of it was seen thro' at this Distance, and you have now found the Use they have made of it.[24]

Preston's dilemma and feeble response served the committee well in meeting its second objective. On July 13th they drafted a letter to be dispatched to their friends in England. The letter was later published in an English monthly magazine.

In an attempt to undermine any prejudicial impact which "The Case of Captain Thomas Preston" may have had in England, the committee noted that "so shocked was Capt. Preston himself at its appearing in this light on this side the water, that he was immediately apprehensive so glaring a falsehood would raise the indignation of the people to such a pitch as to prompt them to some attempts that would be dangerous to him."[25] The committee

hastened to add that "there was no such disposition appearing among the people" and that Preston remained "in safe custody." The information communicated was designed to achieve a dual effect. First, the information published in England regarding the conduct of the inhabitants was untrue. And second, even when maliciously maligned the Boston populace was calm and unaffected and would surely not resort to lynching poor Captain Preston.

The citizens of Boston were consistently reinforced in their prejudice against the military. "Every funeral brings thousands of people together and inflames them against the Troops."[26] The hostilities were further intensified by the general feeling that innocent blood had been spilled and could be expiated only by the spilling of more blood, namely that of the soldiers.

The communications media was clearly controlled by the radicals thus limiting the options of the loyalists. Shortly before the trial of the soldiers a vigorous prosecution by newspaper was inaugurated. Gage perceived the rhetorical strategy clearly: "It is now become usual to open the Eyes of the People thro' the Channel of the Press."[27] The Monday before the trial the Boston Gazette offered a carefully contrived piece of persuasion in the form of an editorial:

> Is it then a dream, murder on the fifth of March, with the dogs greedily licking human blood in King-street. Some say that righteous heaven will avenge it and what says the law of God, whoso sheddeth man's blood by man shall his blood be shed.[28]

At the time the "problem of newspaper-inspired prejudice remained beyond the judges' control."[29]

Public indignation was aroused and the laws of God were advanced by politically influential clergy. Pressure in the form of theological dissertations was exerted from the pulpit. Prior to the trials several prominent clergy (Charles Chauncey, John Browne, and John Lathrop) prepared and delivered quasi-political sermons designed to agitate the public even further. Such pulpit eloquence was another agitational and propagandistic weapon effectively employed by the radicals to create a prejudicial deliberative climate.

The first major legal maneuver required by the situation was the selection of counsel. After drawing up the indictments, the attorney general, Jonathan Sewall, left the province and declared that he would never appear in another courtroom in Boston again. Hutchinson then appointed Samuel Quincy to serve as prosecutor for the crown. Fearing that Quincy's tory leanings might soften the prosecution, the Boston town council selected Robert Treat Paine, a militant whig and future signer of the Declaraction of Independence, as an assistant to the prosecutor. According to prevailing law neither Hutchinson nor the council had the authority to appoint a special prosecutor. But neither side challenged the jurisdiction of the other, both assuming that their interests would be best represented by the selections made.

The choice of defense counsel was another matter. Gage and the military men felt that "Lawyers should be procured from some of the other Provinces."[30] Their wishes were declined and John Adams and Josiah Quincy (Samuel's brother), both prominent radicals, headed the defense team, assisted in Preston's trial by Robert Auchmuty and in the soldiers' trial by Sampson Blowers.

Historians have devoted considerable attention to the analysis of the selection of defense counsel. Specifically, why (if indeed) did Adams and Quincy risk their reputations and futures to defend politically unpopular clients? No doubt cavalier sentiments that an accused, no matter how heinous his crime, is entitled to the best defense available, accounted for part of the reason for their accepting the cause. But more importantly, it should be remembered that Quincy, particularly, accepted the case only after being "advised and urged to undertake it, by an Adams, a Hancock, a Molineux, a Cushing, a Henshaw, a Pemberton, a Warren, a Cooper, and a Phillips."[31] A similar sanction and note of approval by prominent Sons of Liberty probably influenced John Adams' acceptance of the case too. It also bears noting that on June 6, 1770, John Adams was elected by the town as its representative to the General Court of Massacheusetts--after he had accepted the cause of the military. According to Hiller Zobel, the leading authority on the massacre, "Adams' election indicates that the Sons of Liberty considered his representation of the soldiers to be entirely compatible with their own political aims."[32] Even after achieving acquittals for the hated lobsterbacks, John Adams was invited, but declined, to deliver an oration at the annual commemoration of the massacre. So it appears that while Adams and Quincy probably risked being taunted by an ignorant populace, they did not risk their political futures or their lives.

The question remains---why did Sam Adams and the Sons of Liberty encourage radical representation for the accused? Several factors probably account for their willingness to allow the military

to have the best lawyers available. First, their representation would probably prevent posterity's potential censure that the proceedings were conducted unfairly. Second, given their extra-legal maneuvers to insure public support, the radicals probably failed to consider even the possibility of an acquittal. And third, radical representation would probably minimize the risks that Boston's behavior would be tried along with the soldiers. Had indications of premeditation been advanced at the trial, Sam Adams and other leaders of the Liberty party might well have been arrested and tried on charges of treason.

Once counsel had been selected the next legal task was that of scheduling the trials. The radicals, confident that the rhetorical climate was unfavorable to the soldiers, agitated for instant justice. Defense sought a continuance in hopes that the political temper might abate in the interim. The legal as well as extra-legal chicanery which followed culminated in another battle of rhetorical wits--a battle ultimately won by the defense.

Given the inflamed climate created by the radicals, the military felt it necessary to "postpone their Tryals as long as possible, in the Hopes that People will cool by Degrees, and be more cautious of Oaths when they give their Evidences."[33] The judges concurred, forcing the radicals to dip into their rhetorical arsenal and seize any and all weapons which could intimidate and overawe the judiciary, from irate committees demanding immediate justice, to calumnies and insults, and ultimately to threats to withhold judicial salaries.

However, Hutchinson's maneuvers proved more effective. The court met and adjourned, shifted meetings to Cambridge and proceeded on circuit. Then several fortuitous judicial ailments achieved the desired delay. The postponement was of real value because it enabled Hutchinson to get reports through to London and receive orders covering the contingency of conviction. Should the soldiers be found guilty, the governor was to grant an immediate reprieve, pending a full pardon from the King.

By early fall Preston felt that the temper of the town was reasonably conducive to a fair trial and pressed the court for a prompt hearing of his cause. The arraignment took place September 7th, at which time the court abruptly adjourned and proceeded on circuit, thus putting the case off until late October.

At the arraignment Adams launched his first surprise attack. He asked that Captain Preston's trial be severed from that of the soldiers. "Were the officer to be tried in the same proceedings with the men, the resultant mutual finger-pointing might well convince the jury to find all the defendants guilty."[34] That rationale, offered by the leading legal historian on the trials is questionable since neither Preston nor his men could testify in their own behalf. It would remain for counsel to "point the finger", and that seems unlikely. It seems more reasonable to conclude that Adams wanted separate trials because of the potential evidence available to him in his defense. Preston's best strategy would be that he did not order the men to fire. Testimony by one Richard Palmes was the case in point. Palmes had talked to Preston at the scene and inquired whether the soldiers' guns were

loaded and whether he intended them to fire. The first part of the question was answered in the affirmative and the second part "by no means."[35] According to Fleming "Mr. Palmes was the real reason for the separate trials...detaching Preston from his men converted Palmes into a witness for the Captain."[36]

The first task, once the trials were underway, was the selection of a jury. Since contemporary procedures dictated that prospective jurors be selected by town meetings, the strategical advantage to the prosecution is obvious. The final list submitted contained the names of individuals who were favorable to the town's cause. But John Adams was not to be out-maneuvered. He effectively exercized his challenges to excuse all of the veniremen submitted. In this instance colonial defense counsel had a distinct advantage over their colleagues of today. Only the defense was permitted to challenge prospective jurors. And once the list was depleted, it was the custom of the day to fill vacancies by having the sheriff call upon spectators and passers-by to serve, subject to challenge, until a jury had been impaneled. The bystanders available just happened to have been favorable to the defense. In Preston's trial Adams challenged twenty-two of the panel before securing a favorable jury--so favorable in fact that of the twelve jurors eventually selected, five later became loyalist exiles. Of those jurors impaneled for the trial of the soldiers not one came from the town of Boston.[37]

The obvious question remains: why did Sam Adams miss his chance to pack the courtroom with patriots favorable to his cause?

Nothing, unfortunately, has been written to explain his failure to seize this opportunity. This tactical oversight as well as his conspicuous absence from the trial itself, may have been a political concession to his cousin, for by the time the trials commenced, substantial evidence that the townspeople had engineered the fatal clash between the civilians and the soldiers had been amassed. It is also possible that, as with other decisions, overconfidence had once again blinded Sam Adams to the obvious.

John Adams' interim victory in the selection of a favorable jury has led some to consider acquittal a foregone conclusion.[38] Hindsight might provide such certainty but the correspondence of contemporaries[39] clearly shows that they were more prepared for conviction than acquittal--fearing particularly that the fate of Preston and his men would be the same as that of Ebenezer Richardson, the customs informer who fired at a group of boys and killed one while they were attacking his home. The jury, contrary to judicial instructions, found Richardson guilty. Such a precedent, apparent to all, could foil even the best defense strategy.

Having discussed the strategies employed by both sides prior to the trials as well as the preliminary legal maneuvers, attention now needs to be focused upon the issues adjudicated during the trials themselves. Whereas the means to persuasion were relatively unconstrained in the extra-legal situation, the rhetorical potential of courtroom discourse was limited. Only issues relevant and material to the instant controversy should be discussed. That excluded numerous issues which had been the focus of attention outside the courtroom. For instance:

> The right of quartering troops in this province must be discussed at a different tribunal. The constitutional legality, the propriety, the expedience of their appointment are questions of state, not to be determined, nor even agitated by us, in this Court.[40]

Given those limitations the courtroom rhetors nonetheless sought to use the legal forum as an educational forum as well. Specifically, the prosecution, defense and judiciary offered political and legal dissertations designed to inform the public on prevailing criminal law. Such lectures were necessary because of the numerous legal misconceptions which had been circulated to the public outside the legal setting. Clearly the outcome of the pending massacre trials would depend upon an adequate and correct understanding of the law.

In this instance our colonial forefathers had greater flexibility than would contemporary legal rhetors confronted with similar challenges. Colonial lawyers could and did argue law to jurors and colonial judges had greater freedom in instructing them.

Major issues had to be resolved---for the jurors as well as for the public at large. First, what constitutes a lawful or unlawful assembly? Given the circumstances of the affray in King Street this question was applicable to both the soldiers and the inhabitants. The prosecution claimed that the soldiers were an unlawful assembly, and since the law specified that every individual who is part of an unlawful assembly is answerable for the doings of the rest, the military men were guilty as charged. Their purpose for being at the scene had to be closely scrutinized before

the question could be answered. The defense with the support of the judges contended that the soldiers had set out upon a lawful errand, namely assisting a fellow subject in distress. This made them a lawful assembly, the implication of which was a necessary corollary to the prosecutions' contention: "...if any assembly be lawful, each individual of that assembly is answerable only for his own act, and not for any other."[41] The prosecution accepted the purposes for the soldiers' presence as advanced by defense but contended that "even tho they were Lawfully assembled when they got there yet the moment they turned their Arms on the People without just Cause they became an Unlawful Assembly."[42] This concession on the part of the prosecution was unnecessary and unwise. Paine and Quincy failed to make use of the major rhetorical option available to them in establishing that the soldiers had assembled to achieve unlawful objectives. They could and should have made use of Preston's publicly stated purpose of acting to protect the King's money. Had they advanced such evidence they could have established that the soldiers were an unlawful assembly.

The prosecution was equally inept in its efforts to establish that the crowd was a lawful assembly. John Adams was arrayed for battle and made a strong case for the defense contention that the mob was illegally assembled.

> Bailey "Saw the Molatto seven or eight minutes before the firing, at the head of twenty or thirty sailors in Corn-hill, and he had a large cordwood stick." So that this Attucks, and some others, appears to have undertaken

> to be the hero of the night; and to lead this army with banners, to form them in the first place in Dock square, and march them up to King-street, with their clubs; they passed through the mainstreet up to the Main-guard, in order to make the attack. If this was not an unlawful assembly, there never was one in the world.[43]

While important for the defense of the soldiers this information was also imparted for the benefit of the inhabitants of Boston. What constitutes a lawful or unlawful assembly was something that "ought to be known to every one who has any disposition to be concerned in an unlawful assembly, whatever mischief happens in the prosecution of the design they set out upon, all are answerable for it."[44] The judges too felt compelled to address the colonists on this subject and inform them specifically that the redressing of public grievances by violence "is levying war against the King and is treason."[45]

Adams' motives become even clearer when we examine the entries he made in his diaries years later.

> ...It appeared to me, that the greatest Service which could be rendered to the People of the Town, was to lay before them, the Law as it stood, that the[y]might be fully apprized of the Dangers of various kinds, which must arise from intemperate heats and irregular commotions.[46]

Adams used the legal forum to advance his own political philosophy that "mobs will never do"[47] and to warn his fellow citizens of the dangers inherent in following a course based on violence.

The second major issue to be resolved was the question of self-defense. Was there just cause for the soldiers firing into the crowd? The prosecution claimed that the soldiers were not justified in firing into the crowd unless they could in no other way extricate themselves from the situation. Paine reasoned that the "plea of Self Defence which is made for them must inevitably fail unless you can be Satisfied there was no other possible way of Saving their Lives but by (firing) killing."[48] The defense disagreed and countered with the following argument.

> When the multitude was shouting and huzzaing, and threatening life, the bells all ringing, the mob whistle screaming and rending like an Indian yell, the people from all quarters throwing every species of rubbish they could pick up in the street, and some who were quite on the other side of the street throwing clubs at the whole party, Montgomery in particular, smote with a club and knocked down, and as soon as he could rise and take up his firelock, another club from a far struck his breast or shoulder, what could he do? Do you expect he should behave like a Stoick Philosopher lost in Apathy? Patient as Epictatus while his master was breaking his leggs with a cudgel?[49]

Justice Trowbridge concurred with Adams: "a man is not obliged to wait until he is killed, or struck, before he makes use of the necessary means of self defence."[50]

The right of self defense was established and the laws of nature upheld---even for the military. The soldiers retained the same rights as other citizens, the natural right, to defend themselves if they thought their lives were in danger. And even if the jurors thought that the attack upon them was not so severe as to endanger their lives then the law nontheless reduced their crime to that of manslaughter rather than murder.

Since the soldiers used the last extremity available in defending themselves their justification depended on the danger they faced. The major strategical decision facing defense counsel therefore was how vigorously to prosecute the town in order to justify the homicides. Should counsel produce evidence establishing only the circumstances occuring the evening of the fatal clash or should evidence of prior encounters between the military and civilians be introduced? Gage and the military men endorsed the latter strategy.

> Not only what happened on the said Night, should be circumstantially made to appear, but also every Insult and Attack made upon the Troops, previous thereto, with the Pains taken by the Military to prevent Quarrells between the Soldiers and Inhabitants.[51]

On this question the propaganda issues at the focus of attention outside the courtroom converged with those disputed in court. Evidence of prior encounters between the military and the inhabitants was thought to fortify the present campaign. "The counsel for the crown insisted upon producing evidence to prove the menaces of the soldiers preceding the action, and the counsel for the prisoners consented to it, provided they might have the like liberty with respect to the inhabitants."[52] The wisdom of

such a strategy is obvious for the prosecution. Had they been able to establish, as they intended, that the soldiers had gone out on numerous occasions and that evening in particular, in search of trouble with the inhabitants, the soldiers would have been guilty of murder. The consequences of the reverse course, if pursued by the defense, are not quite as obvious. Contemporary opinions by the leading analysts on the trials leaves us with the impression that "establishing proof of the danger Preston and his men faced meant nothing less than in effect, prosecuting the entire town of Boston for assault with intent to kill."[53]

Available transcript evidence, surviving correspondence of contemporaries, and the conclusions of present-day scholars indicate quite clearly that the defense did not pursue such a course. The defense declined to produce evidence of events leading up to the massacre and did not produce testimony which would have established the general anti-military mood of the town. Instead they confined their defense to the circumstances of the fatal evening and established that <u>one Boston mob</u> had assaulted <u>a specific group</u> of British soldiers and provoked <u>a scuffle</u> which resulted in the death of five civilians.

This course of action met with immediate rebuke and has been the subject of historical controversy ever since. The familiar story, that Josiah Quincy attempted to prosecute the inhabitants indirectly through his examination of witnesses and that John Adams forced him to desist with threats to withdraw from the case if he did not, has been frequently cited to support the claim that Adams was more interested in protecting the town than his clients.

While the trial was still going on there was "a Report in Town... that one of the Council is not so faithful as he ought to be...."[54] While Hutchinson was willing to dismiss the problem, attributing it to a "difference in opinion", Dalrymple was not so generous. "The Lawyers have held back much on the occasion, and tho they are goaded on daily they do their parts but ill."[55]

Contemporary evaluations of John Adams as an attorney are varied. As history is reinterpreted we find Adams first eulogized and then denigrated. Some depict him as a paladin of justice, a devoted servant of the court who risked his reputation and future to win acquittals in the face of overwhelming odds.

> Probably nowhere in the annuals of history has there been a more splendid example of moral courage than that provided by Adams and his associates, who literally risked everything in the cause of justice.[56]

At the other extreme, this lusterous image has been tarnished by recent evaluations casting doubt upon Adams' professional integrity. Accepting Hutchinson's account of the Adams/Quincy controversy Hiller Zobel concludes that "in trying to do what he considered justice to Boston, John Adams came shockingly close to sacrificing his clients for the good of his constituency."[57]

A more moderate appraisal is offered in Rogers' rhetorical analysis of Adams' summation to the jury.

> Even if one believes that Adams delivered some and not all of the persuasive facts, it is still possible to agree that the speech was effective. The speech, however,

> does not provide any indication that Adams attempted to try the city of Boston for their part in the so-called Boston Massacre.[58]

Evaluations, commending or condemning Adams, are all contingent upon the acceptance of the conclusion that the best possible defense for the soldiers would have been to expose the intentions of the inhabitants and establish that they had a preconcerted plan of attack.

Several reasons for Adams' refusal to pursue this strategy have been advanced. First, Adams was really intent on protecting the interests of the town, especially those of his political compatriots, who might well have been tried for treason had evidence of premeditation been advanced. Second, acquittal was a foregone conclusion and did not therefore require such evidence. And third, had Adams introduced evidence maligning the character of Boston, the inhabitants might well have retaliated with attacks on the jury and the defendants. Given the nature of Boston mobs in general as well as the concerted propaganda efforts being made by the Sons of Liberty to project themselves as the injured party, this seems unlikely as well as self-defeating.

These reasons, while acceptable explanations to some, leave one with a very superficial impression of the prevailing legal situation. For us to adequately assess the rhetorical potential of the defense's discourse and evaluate their strategical choices accordingly, we need to know the rhetorical strategies which were legally sanctioned and thus rhetorically feasible as well as those prohibited and therefore not available to counsel.

Defense's dilemma when approached in this way yields a more cogent explanation for Adams' choices. Evidence of "premeditated Mischief" would have had a direct bearing upon the question of whether the soldiers had cause to think that they were in danger. But the question of whether they were justified in firing on the crowd given that information was another matter. Had John Adams followed the strategy of exposing the town of Boston as a mob committed to violence, then he would have legally compromised his clients! Had the defense proved that the town engineered the fatal clash and the soldiers were cognizant of this attempt to provoke violence, then the Captain and his men "might have been accused of recklessly entering a situation of peril without sufficient justification."[59]

> Had John Adams permitted Josiah Quincy to prosecute the entire town of Boston for assault with intent to kill, the jury might have been more convinced that Preston and his men were in a situation of grave peril. But that evidence depended on proving that everyone knew and expected there was going to be trouble--that the people were making threats and even planned violence. Preston, as much as anyone, would have known about the danger.[60]

Clearly, had such evidence been produced Adams would have undermined the defendants' plea of justifiable homicide. One could claim the right of self-defense only if one were not at fault. The soldiers and the inhabitants would have been equally culpable for the tragedy if the soldiers had knowingly entered a situation which was likely to result in violence. Given the law applicable to the

instant case it was not rhetorically prudent for Adams to indict the town for its prior actions and accordingly not his best line of defense. Evaluations of the rhetorical merit of Adams strategy should reflect that the choices he exercized were effective---not in spite of his protection of the interests of the town--but because of them. As Adams himself predicted we would discover that he had "good Policy" as well as "sound Law" on his side.[61]

Although the radicals may have won the propaganda battle outside the courtroom, the loyalists clearly won the legal skirmish. The radicals were outmaneuvered at every turn by the skillful strategies and tactics of the defense and betrayed by the inept efforts of the prosecution in airing their cause. The soldiers received a fair trial and a just verdict and the town had been enlightened on the "Laws against Riots, Routs, and unlawful assemblies."

The larger issues of the cause were not resolved and even after the acquittals the propaganda value of the incident was not curbed. In a series of scathing articles in the Boston Gazette, Samuel Adams, under the pseudonym of Vindex, denounced the juries' verdicts as well as defense arguments. The articles sought to perpetuate the error that the soldiers could not justify themselves in firing upon the people without the order of a civil magistrate.[62]

In years following, the anniversary of the massacre came to be the occasion for public orations which were designed to keep alive resentment. Such celebrations inflamed the colonists until well after the Revolution itself was over. The addresses commemorating

the occasion were separately published and desseminated throughout the colonies. After 1783, the March 5th anniversary took second place to celebrations of the fourth of July. Even after the ceremonial orations ceased, other dedications did not. On May 17, 1887, out of deference to public sentiment, the General Court of Massacheusetts voted to erect a monument to the victims of King Street.

In this bicentennial year it would be appropriate to consider dedicating another monument---not to the victims of the Boston Massacre--but to John Adams and Josiah Quincy, who upon closer reflection of their rhetorical efforts, merit such veneration.

Footnotes

[1]Wade Millis, "A Monument to the American Sense of Justice," Michigan Law Review, 25 (December, 1926), p. 144.

[2]For a more detailed account see Chapter 16 in Hiller B. Zobel, The Boston Massacre (New York: W.W. Norton, 1970), pp. 180-205.

[3]Zobel, "Law Under Pressure: Boston 1769-1771," in George Athan Billas, ed., Law and Authority in Colonial America (Barre, Mass.: Barre, 1965), p. 202.

[4]Catherine Barton Mayo, ed., "Additions to Thomas Hutchinson's 'History of Massachusetts Bay,'" American Antiquarian Society Proceedings, 59 (April, 1949), pp. 18-19.

[5]Gage to Dalrymple, March 19, 1770, in Randolph G. Adams, "New Light on the Boston Massacre," American Antiquarian Society Proceedings, 47 (October, 1937), p. 290.

[6]Gage to Dalrymple, April 9, 1770, in Adams, "New Light," p. 301.

[7]April 9, 1770, in Adams, "New Light," p. 301.

[8]See Louise Phelps Kellogg, "The Paul Revere Print of the Boston Massacre," Wisconsin Magazine of History, I (n.d.), pp. 377-387.

[9]Adams, "New Light," p. 277.

[10]Adams, "New Light," p. 282.

[11]Minutes of the Boston Council Meeting, March 6, 1770, in Adams, "New Light," p. 275.

[12]Albert Matthews, ed., "Captain Thomas Preston and the Boston Massacre," Colonial Society of Massachusetts Publications, 7, 4 (April, 1900), p. 6.

[13]Gage to Dalrymple, March 26, 1770, in Adams, "New Light," p. 293.

[14]Matthews, pp. 6-10.

[15]Matthews, p. 8.

[16]April 28, 1770, in Adams, "New Light," p. 306.

[17]May 5, 1770, in Adams, "New Light," p. 308.

[18]"The Troops could not act by Military Authority, and no Person in Civil Authority would ask their aid. They were there contrary to the wishes of the Council, Assembly, Magistrates and People, and seemed only offered to abuse and Ruin. And the Soldiers were either to suffer ill usage and even assaults upon their Persons till their Lives were in Danger, or by resisting and defending themselves, to run almost a Certainty of suffering by the Law." Gage to Hillsborough, April 10, 1770, quoted in Zobel, Boston Massacre, pp. 180-181.

[19]Matthews, p. 11.

[20]June 17, 1770, in Adams, "New Light," p. 311.

[21]June 23, 1770, in Adams, "New Light," p. 313.

[22]"This was a flat lie, as a comparison of the original (now in the Public Records Office) with the Gazette's version will show." Zobel, Boston Massacre, p. 236.

[23]Shortly after this encounter with the council Preston wrote to Gage expressing fear for his life. He had been intimidated with reminders of the fate of Captain John Porteous, who under similar circumstances in Edinburgh in 1736, had been tried, convicted and sentenced to death and although reprieved, had been abducted from prison and lynched by a mob.

[24]August 12, 1770, in Adams, "New Light," p. 325.

[25]Matthews, p. 17.

[26]Hutchinson to Gage, March 18, 1770, in Adams, "New Light," p. 287.

[27]Gage to Dalrymple, April 9, 1770, in Adams, "New Light," p. 301.

[28]Quoted in Hugh P. Williamson, "John Adams, Counsellor of Courage," American Bar Association Journal, 54, 2 (February, 1968), p. 150.

[29]Zobel, Boston Massacre, p. 223.

[30]Gage to Dalrymple, August 5, 1770, in Adams, "New Light," p. 320.

[31]Quincy to his father, quoted in Zobel, Boston Massacre, pp. 220-221.

[32]Boston Massacre, p. 231.

[33]Gage to Hutchinson, April 9, 1770, in Adams, "New Light," p. 302.

[34]Kinvin L. Wroth and Hiller B. Zobel, eds. Legal Papers of John Adams (Cambridge, Mass.: Harvard University Press, 1965), III, 17.

[35]Wroth and Zobel, III, 66.

[36]Thomas J. Fleming, "Verdicts of History I: The Boston Massacre," American Heritage, 18, 1 (December, 1966), p. 104.

[37]John Phillip Reid, "A Lawyer Acquitted: John Adams and the Boston Massacre Trials," American Journal of Legal History, 18 (July, 1974), pp. 193-197.

[38]"...we can probably be fairly sure that before a single witness had been sworn, the outcome of the trial was certain." Zobel, Boston Massacre, p. 246. Rogers goes even further and claims that "Zobel may have been guilty of an understatement." Jimmie N. Rogers, "John Adams' Summation Speech in Rex v. Wemms, et al: A Delicate Act of Persuasion," The Southern Speech Communication Journal, 39, 2 (Winter, 1973), p. 137.

[39]Gage to Hutchinson, April 30, 1770, in Adams, "New Light," p. 306.

[40]Josiah Quincy's opening statement for the defense, Wroth and Zobel, III, 163-164.

[41]Quincy, in Wroth and Zobel, III, 235.

[42]Paine, in Wroth and Zobel, III, 280.

[43]Adams, in Wroth and Zobel, III, 268.

[44]Adams, in Wroth and Zobel, III, 252.

[45]See Justice Trowbridge's charge to the jury, Wroth and Zobel, III, 295.

[46]Adams, in Wroth and Zobel, III, 28-29.

[47]Adams papers quoted in Wroth and Zobel, III, 33.

[48]Wroth and Zobel, III, 281.

[49]Adams, in Wroth and Zobel, III, 268.

[50]Wroth and Zobel, III, 300.

[51]Gage to Dalrymple, June 17, 1770, in Adams, "New Light," p. 310.

[52]Hutchinson, in Mayo, pp. 32-33.

[53]Wroth and Zobel, III, 2

[54]Hutchinson to Gage, December 3, 1770, in Adams, "New Light pp. 348-349.

[55]Dalrymple to Gage, December 3, 1770, in Adams, "New Light, p. 349.

[56]Williamson, p. 151.

[57]Zobel, "Newer Light on the Boston Massacre," American Antiquarian Society Proceedings, 78 (1968-1968), p. 124.

[58]Rogers, p. 144.

[59]Reid, p. 203.

[60]Reid, p. 204.

[61]Adams papers quoted in Wroth and Zobel, III, 33.

[62]See Hutchinson's account in Mayo, pp. 33-34.